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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 41784
)	
v.)	KOOTENAI COUNTY
)	NO. CR 2013-6031
)	
JOHNNY WAYNE PHELPS,)	REPLY BRIEF
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE RICH CHRISTENSEN
District Judge

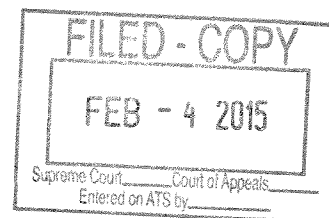
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STATEMENT OF THE CASE

Nature of the Case

Johnny Wayne Phelps was convicted, following a jury trial, of one count of felony domestic battery. On appeal, Mr. Phelps contends that the district court erred in admitting hearsay statements made during a videotaped interview between law enforcement and the alleged victim. This reply brief is necessary to address the State's contention that Mr. Phelps did not sufficiently identify the particular statements he maintained were inadmissible.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Phelps's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto. However, to the extent the State claims in its Respondent's Brief that there was an error in the transcript,¹ Mr. Phelps disputes such a contention as the evidence in the record is simply conflicting, and there is no basis to

¹ In its Respondent's Brief, the State noted:

In his brief, Phelps writes: "Officer Koontz testified that the call came in to police dispatch at 9:18 p.m. [sic], and he was dispatched from the police station at 9:28 [sic] p.m." (Appellant's Brief, p.10.) It is clear from the next question and answer, however, that the "19:28" is an error in the transcript. The prosecutor's next question was, "Okay. So two minutes from the time that dispatch received the call, to the time that you left the police department?" (Tr., p.183, Ls.16-18 (emphasis added).) Officer Koontz answered: "Right." (Tr., p.183, L.19.) That the dispatch time was 19:20 as opposed to 19:28 is consistent with Officer Koontz's report. (R., p.9 (noting Officer Koontz responded at "1920 hours")). Thus to the extent Phelps is counting the time lapse as including an additional eight minutes, he is incorrect.

(Respondent's Brief, p.5, n.2.)

decide one way or the other whether the officer's testimony that it was ten minutes between when the call came in and when he left was an error in the transcript or whether the prosecutor's question, "So two minutes from the time that dispatch received the call, to the time you left the police department," was an error in the transcript and should have read "ten" instead of "two." The prosecutor never elicited further testimony to clarify the ambiguous testimony and evidence. Further, evidence relied on by the State supports Mr. Phelps' contention that Ms. Marshall wasn't interviewed until well over ten minutes after the incident, as the officer's report indicates that the incident actually took place at 1908 hours, such that the officers still didn't reach Ms. Marshall until twelve minutes after the altercation. (R., p.9.) As such, Mr. Phelps' interpretation that it was over ten minutes between the call to the police and the time the officer arrived at the bar is reasonable and is not inconsistent with the testimony and evidence adduced at trial.

ISSUE

Did the district court abuse its discretion by admitting hearsay statements contained in a videotaped interview?

ARGUMENT

The District Court Abused Its Discretion By Admitting Robyn Marshall's Hearsay Statements Contained In A Videotaped Interview As The Statements Did Not Fall Under Any Exception To The Hearsay Rule

The district court erred in admitting the hearsay statements contained in the videotaped interview of Ms. Marshall. Where the remarks occurred more than fifteen minutes after the incident, the comments were made in response to questions asked of Ms. Marshall by law enforcement, were not made for purposes of medical treatment, and where Ms. Marshall had substantial time to reflect on the accident and thus made the remarks with the goal of ensuring Mr. Phelps was prosecuted, the statements are not admissible under any hearsay exception(s).

The State claims that because Mr. Phelps did not identify which statements he is asserting were improperly admitted, this Court should decline to consider the admissibility of the statements. (Respondent's Brief, pp.8-9.) However, Mr. Phelps did specifically identify several objected-to statements (Appellant's Brief, pp.1, 13), and Mr. Phelps objected to the entire audio portion of the recording. (Trial Tr., p.189, Ls.7-10.) While he did not identify each objectionable statement in his Appellant's Brief, Mr. Phelps amply identified the type of statement, the potential legal basis under which the statement may have been admitted, and why the district court improperly admitted such statements. (Appellant's Brief, pp.6-16.) Where the statements Mr. Phelps sought to exclude can be categorized according to their subject matter, Mr. Phelps sufficiently preserved the issue for appellate review, particularly when he maintained his objection to all of the statements contained in the recording, and the recording was admitted into evidence. Further, when the district court admitted the audio portion of the recording, it

apparently admitted all of the statements by Ms. Marshall as “excited utterances,” but it did not parse through each individual statement. (Trial Tr., p.189, L.11 – p.192, L.24.) The district court did not distinguish which statements it was admitting as excited utterances compared to other statements it may have found were admissible on alternative grounds. Thus, Mr. Phelps is unable to further dissect the district court’s findings.

The objectionable statements were clear from their context. To preserve an objection for appellate review, “either the specific ground for the objection must be clearly stated, or the basis of the objection must be apparent from the context.” *Hansen v. Roberts*, 154 Idaho 469, 473 (2013) (quoting *Slack v. Kelleher*, 140 Idaho 916, 921 (2004)); I.R.E. 103(a)(1).

Contrary to the State’s argument, it is not necessary for this Court to “parse through the statements” in order to find error. (Respondent’s Brief, p.9.) The circumstances surrounding the statements were clear—it was a considerable period of time after the incident, in a different location, and Ms. Marshall’s statements were in response to police questioning after sufficient time for reflection. All of the statements at issue were contained in an admitted exhibit, State’s Trial Exhibit No. 13, and Mr. Phelps identified the content of the statements, and analyzed whether the type of statement fell within the hearsay exception. (Appellant’s Brief, pp.5-16.) Further, none of the statements quoted by the State in its Respondent’s Brief indicate any information to the contrary. An exact verbatim recitation of each statement is not necessary for this Court to determine that sufficient time had elapsed such that the statements were no longer close enough in time to be contemporaneous, that the statements did not contain

sufficient indicia of reliability such that they could come in under the residual hearsay exception, no statements were made for purposes of medical treatment where the police were the ones asking Ms. Marshall questions, and the statements were not regarding an existing physical condition or a present sense impression. As such, Mr. Phelps sufficiently identified the statements at issue in the official court record both by including quotations in his brief and by referencing the entirety of the recording.

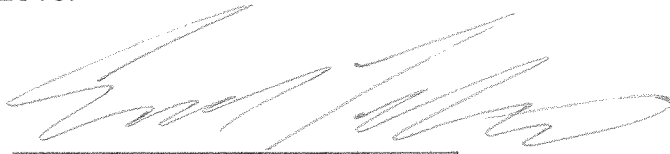
Ultimately, Mr. Phelps asked that all of the statements contained in the video be inadmissible as hearsay. It is not necessary for him to break it out line by line, as the statements can generally be categorized. This is especially proper where the prosecutor did not break them out line by line, but instead sought their admission under multiple bases as either: (1) excited utterances, (2) present sense impressions, (3) statements for purposes of medical treatment, (4) existing physical condition, or (5) residual or “catch-all” hearsay exceptions.

The district court erred by holding that the statements contained in the recording could be admitted at trial under hearsay exceptions I.R.E. 803(1)-(4), (24). Mr. Phelps respectfully requests that this Court vacate the judgment of conviction, and remand this matter to the district court for a new trial.

CONCLUSION

For the reasons set forth herein, Mr. Phelps respectfully requests that this Court vacate the judgment of conviction, and remand this matter to the district court for a new trial.

DATED this 4th day of February, 2015.


for SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of February, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:


JOHNNY WAYNE PHELPS
PO BOX 124
ATHOL ID 83801

RICH CHRISTENSEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

LISA M CHESEBRO
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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', written over a horizontal line.

EVAN A. SMITH
Administrative Assistant

SJC/eas